87 1066

FILED
DEC 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SIERRA MARKETING CO. a partnership of RALPH BAWDEN, and MOISE GALLEGOS,

Petitioners,

v.

ROTATIONAL MOLDING INC. a California corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THOMAS M. MALEE
Attorney at Law
1045 North 24th Street
Billings, Montana 59101
(406) 245-8304

Counsel of Record for the Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether the price of the product to be sold is an essential term of a sales agency contract?
2. Whether the quantity or amount to be sold is an essential term of a sales agency contract?
3. Whether the ruling of the Court of Appeals, which applied Real Estate contract law to the sales agency contract in this case, directly conflicts with decisions by the Second, Sixth, and Eighth Circuit Courts of Appeal, and with federal District Court decisions in the Third and Ninth Circuits?
4. Whether there is an overriding need for national uniformity on the law of sales agency contracts?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES, TREATIES, AND OTHER LAWS INVOLVED	2
STATEMENT OF THE CASE	2
A. The Contract between the Parties	2
B. The District Court's Ruling	5
C. The Ninth Circuit's Decision that the Contract is invalid	6
REASONS FOR GRANTING THE WRIT	8
I. THIS CASE PRESENTS IMPORTANT AND FREQUENTLY RECURRING QUESTIONS CONCERNING THE INTERPRETATION OF INTERSTATE COMMERCIAL CONTRACTS	8
A. THE COURT OF APPEALS DECISION MARKS AN ABRUPT DEPARTURE FROM THE LONG-SETTLED RULES OF INTERPRETING MULTI-STATE SALES AGENCY CONTRACTS, AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEAL	9
B. THERE IS AN OVERRIDING NEED FOR NATIONAL UNIFORMITY IN THE INTERPRETATION OF SALES AGENCY CONTRACTS	14
CONCLUSION	15

TABLE OF AUTHORITIES

CASES	Page
Ablett v. Clausen, (1954) 43 Cal.2d 280, 272 P.2d 753	6
Bendix Home Appliances v. Radio Accessories Co., (8th CCA) 129 F.2d 177	12
Jay Dreher Corporation v. Delco Appliances Corp., (2nd CCA 1937) 93 F.2d 275	11
J.C. Millet v. Park & Tilford Distillers, (1954 DC Cal) 123 F.Supp. 484	13
Ken-Rad Corporation v. R.C. Bohannon, (6th CCA 1935) 80 F.2d 251	11
Laveson v. Warner Mfg Co., (1953 DC NJ) 117 F.Supp. 124	13
Louis Lesser Enterprises Ltd v. Roeder, (1962) 209 Cal.App.2d 401, 25 Cal.Rptr 917	7
U.S. v. Swift, (1926) 270 US 124, 46 S.Ct 308, 70 L.Ed 497	13
Willred Co. v. Westmoreland Metal Mfg Co., (1959 ED Pa) 200 F.Supp 55	13
STATUTES AND REGULATIONS	
28 United States Code § 1254(1)	2
MISCELLANEOUS	
Corbin, *Contracts,* § 155	9
Williston, *Contracts,* § 1027A	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No.

SIERRA MARKETING CO. a partnership of
RALPH BAWDEN, and MOISE GALLEGOS,
Petitioners,

v.

ROTATIONAL MOLDING INC. a California corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Sierra Marketing Company, comprised of partners Ralph Bawden and Moise Gallegos, hereby respectfully petition for a writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the District of Montana is unreported, and is reproduced at page 7a of petitioners' Appendix. The opinion of the United States Court of Appeals for the Ninth

Circuit is also unreported and is reproduced at page 1a of Petitioners' Appendix. A request for publication is pending.

JURISDICTION

The judgment of the Court of Appeals was entered August 5, 1987. A Petition for Rehearing was denied on September 24, 1987. The jurisdiction of this Court is invoked under 28 USC 1254(1) (1982).

STATUTES, TREATIES, AND OTHER LAWS INVOLVED

The issues in the present case concern the rules of construction applicable to sales agency contracts, which, as discussed infra, are matters of federal common law.

STATEMENT OF THE CASE

A. The contract between the parties.

Petitioners Ralph Bawden and Moise Gallegos, who comprise the partnership of Sierra Marketing Company, are Montana and Utah residents respectively. Through their partnership, they intended to market building products throughout the western United States. The Respondent, Rotational Molding Inc. is a resident of California, and manufactures polyethylene products.

On May 25, 1983, the Petitioners entered into a written contract with the Respondent. (Petitioners' Appendix, page 9a-12a) The contract provided that the Petitioners would have the exclusive right to market the Respondents' polyethylene septic tanks in a twelve state area of the western United States. The basic term or duration of the contract was to be five

years. As compensation for their marketing and sales efforts, the Petitioners were to receive a commission of fifteen percent of the net invoice value of all of Respondents' polyethylene septic tanks sold in the distribution area. The Respondent was obligated to provide Petitioners with a reasonable supply of samples and advertising material. (All at Petitioners' Appendix, page 9a-12a)

At the time the contract was signed, the Respondent promised Petitioners that the product would be in production and ready for market within 90 days, although this promise was not included in the contract. At trial, the Petitioners proved that a reasonable time for placing this product on the market would be six months.

The contract referred to a schedule of prices and terms of sale of the product, using the following language:

> "In obtaining sales of the Principal's (Respondent's) products, the Sales Agent shall quote only the prices and terms set forth in the annexed schedule or such prices and terms as may be fixed hereafter by the Principal." (Pet. App. page 10a) (Parenthetical wording added)

Such a schedule was not attached to the contract at the time it was signed. However, the Respondent did later set prices and terms of sale. On June 9, 1983, just 15 days after the contract was signed, the Respondent sent a letter to Petitioners stating that the price of their polyethylene septic tanks would be "$350, FOB Gardena," (California), thus furnishing that term of the contract. (Pet. App. page 13a)

The contract also referred to a quota schedule, which was to set the minimum number of septic tanks to be sold by the Petitioners. No quota schedule was attached to the contract at the time it was signed, because the parties agreed that they needed more market information before a quota schedule could be formulated.

The Respondent submitted a quota schedule to the Petitioners in March, 1984, and the Petitioners agreed to it. (Pet. App. page 15a, 20a)

Both parties began performance on the contract soon after it was signed. The Petitioners conducted extensive market surveys for the product throughout the entire distribution area, and commenced contacting dealers and representatives in the area to set up a marketing network. The Respondent began designing the mold for the product and placed an order for the mold with a metal fabricating plant.

Although it promised to have the product ready in 90 days, the Respondent kept moving the due date back, citing various difficulties. The Petitioners repeatedly requested the promised sales literature, but never received any. Despite these two problems, relations between the parties remained fairly good.

However, in February, 1984, the situation began to change. The Respondent told Petitioner Bawden that a prototype of the product had already been manufactured, that it was presently being tested, and that Respondent expected to have it ready for market very soon. The Respondent was very enthusiastic about the product. At the same time, the Respondent told Petitioner that it wanted to make certain changes in the contract. The changes were, 1) That the Respondent would take back much of the sales ter-

ritory, namely, the states of Washington, Oregon, and large parts of California, 2) The Petitioners' commission would be reduced from 15% of the net invoice value to a flat $50 per tank, and 3) The contract's duration would be reduced from 5 years to one year. (Pet. App. page 17a) The Respondent told the Petitioner that the changes would have to be accepted, or there would be no contract, i.e. that the Respondent would break the contract. The Petitioners replied that they would lower their commission to 12%, but that they would not agree to any other changes. In March, 1984, the Respondent wrote a letter to Petitioners purporting to cancel the contract.

In August, 1984, the Petitioners brought suit against Respondent for breach of contract in the Federal District Court for the District of Montana, Billings Division.

B. THE DISTRICT COURT'S RULING

This suit came to trial on March 31, 1986. After Petitioners rested their case, the District Court granted Respondent's motion for a directed verdict. (Pet. App. page 7a)

In an oral opinion issued in open court, the District Court held that the contract was "incomplete" because it did not contain a quota schedule, and was, therefore, unenforceable. In addition, the Court held that the contract did not require the Respondent to manufacture any septic tanks. Terming the contract a "sales agreement," the Court did not cite any authority in support of it's decision. The Court recognized that the parties later agreed to a quota schedule, but stated that "this doesn't do us any good, because there weren't at the time any septic tanks produced for sale." (Pet. App. page 8a)

C. THE NINTH CIRCUIT'S DECISION THAT THE CONTRACT IS INVALID

The Petitioners appealed the District Court's decision and, in a memorandum decision, the Ninth Circuit affirmed. (Pet. App. page 1a) Petitioners sought a rehearing, which was denied on September 24, 1987. (Pet. App. page 6a)

In it's brief decision, a panel of the Ninth Circuit noted that "the agreement signed in May, 1983, referred to both a quota schedule and an annexed schedule of prices, neither of which was attached to the contract or agreed upon at the time the contract was signed." (Pet. App. page 3a) The panel then cited two cases in support of it's ruling on the merits of the contract, neither of which has anything to do with sales agency contract law.

The first, *Ablett v. Clausen,* (1954) 43 Cal. 2d 280, 272 P.2d 753, involved a landlord-tenant dispute over a leasehold interest. The landlord-Plaintiffs in that case brought an unlawful detainer action against the tenant-Defendants, claiming that the tenants' right of first refusal to re-lease the premises for an additional term was unenforceable because it used the words "upon such terms as may be agreed upon." The California Court held that the right of first refusal existed only if the property was relet at the end of the Defendants' term. If the lessors retained the premises themselves, the Defendants had no right to another lease term. The Ninth Circuit cited *Ablett* for the proposition that a contract is unenforceable if an essential term is left open for future agreement. The case, as noted above, involved a leasehold, or real estate, contract.

The Ninth Circuit then cited *Louis Lesser Enterprises Ltd v. Roeder,* (1962) 209 Cal.App.2d 401, 25 Cal.Rptr 917, which involved a contract for the purchase and development of a parcel of real estate. The contract in that case allegedly consisted of three letters between the Plaintiffs and Defendant. The Defendant had already paid part of the purchase price on the land to be developed, a 200 acre parcel in Las Vegas. The Plaintiffs offered to furnish additional money to complete the purchase and develop the land. The letters stated that the agreement would subsequently be reduced to a formal contract by attorneys. In addition, both parties stated to each other that there would be no binding agreement until an attorney had drawn up a written contract. That was never done. The Ninth Circuit cited *Lesser* for the proposition that, if the parties are aware that their agreement is not complete because an essential term has not yet been agreed upon, no binding contract exists. The proposition is not entirely supported by the case cited. *Lesser,* as did *Ablett,* involved real estate contract law.

The Ninth Circuit, in the instant case, also reached the anomalous conclusion that it was necessary for both parties to agree on the design of the product, though the contract places the burden of manufacture, (and impliedly, design), of the product on the Respondent manufacturer, and all of the trial testimony stated that the Respondent had sole responsibility for design.

The Ninth Circuit, in it's opinion, cited, or appeared to cite, the lack of a quota schedule as the most important deficit in the contract. (Pet. App. page 4a)

The Petitioners proved at trial, through uncontested documentary evidence, that the parties subsequently agreed upon two of the omitted terms, those being the price of the product and the quota schedule. If it could be contended that there was any deficiency in the contract, it was subsequently cured by ratification by both parties. The Ninth Circuit, however, dismissed the ratification by holding that, because the quota schedule, which was agreed to by Petitioners, was sent to Petitioners along with proposed changes to the contract, which were not agreed to by Petitioners, no agreement was reached on the quota schedule, another anomalous conclusion.

In deciding this sales agency contract case, the Ninth Circuit cited as authority only two real estate contract cases, ignoring the large body of national sales agency contract law that has developed over the past fifty years.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT AND FREQUENTLY RECURRING QUESTIONS CONCERNING THE INTERPRETATION OF INTERSTATE COMMERCIAL CONTRACTS

The decision of the Court of Appeals holds that sales agency contracts, which generally cover multi-state areas of the United States, are now subject to the rules of ordinary contract law. As detailed below, the Court of Appeals decision directly conflicts with more than 50 years of federal common law on sales agency contracts, and, in the absence of correction by this Court, is likely to produce considerable confusion as different rules of interpretation are applied to commercial contracts covering multi-state areas of the United States.

A. THE COURT OF APPEALS DECISION MARKS AN ABRUPT AND POTENTIALLY CHAOTIC DEPARTURE FROM THE LONG-SETTLED RULES OF INTERPRETING MULTI-STATE SALES AGENCY CONTRACTS, AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEAL

For more than fifty years, ever since more and more manufacturers began selling their products beyond purely local markets, sales agency contracts have occupied a special place in the law of contracts generally. Because of the realities of economic life, it is often impossible to set a product's price, and the amount to be sold in a sales agency contract, particularly when the product is new and untested in the market. Yet, it is important that these contracts be binding and enforceable, because of the large investments made by both the sales agent and the manufacturer. For these reasons, the Federal Courts, and state courts following their lead, have not required the same standards for definiteness and certainty in sales agency contracts, that apply to other contracts, especially in respect to price and quantity.

The principles governing sales agency contracts are so well-settled that they have been definitively set forth in legal treatises. In Corbin on Contracts, section 155, the following is stated about sales agency contracts:

> "Often a sales agency contract does not fix the amount of goods or the number of articles that the agent must take or sell. The exigencies of business often require that this must be left flexible, so that it may vary with general business conditions and with manufacturing needs and difficulties. Such a con-

> tract usually contains various subsidiary promises on both sides. Such subsidiary promises are sufficient consideration for any return promises, so that the contract should not be held void for lack of "mutuality." Promises by the agent to advertise and to promote sales with diligence and by the manufacturer to supply goods to any reasonable extent as ordered are readily to be found by implication. These implied promises also are sufficient consideration and are not so indefinite or uncertain as to be unenforceable."

In Williston on Contracts, section 1027A, the nature of sales agency contracts is discussed in connection with the duration of such contracts:

> "Usually the agent or buyer, as the case may be, is doing more than merely offering to render services or to pay the price for the goods. It is at least expected and understood, and in fact, frequently expressly provided in the contract, that he is to make a substantial investment and to build up or maintain a business establishment for the distribution of the manufacturers' products. On the other hand, the manufacturer entrusts the fate of his product in the defined territory exclusively to this agent or distributor, and, in thus forbearing to resort to other sources of distribution in that locality, he gives up a valuable right. The validity of such exclusive sales agencies or of such exclusive sales and distribution contracts during their continuance is obvious." (Williston, Contracts, Sec. 1027A, at 2848)

In that same section, the difference between pure sales agency contracts, and sales and distribution contracts, is discussed. In the former, the sales agent does not purchase the product from the manufacturer, but solicits orders from consumers, so that the sale takes place between the manufacturer and the consumer. In the latter, the agent or distributor buys the product from the manufacturer, and then resells it to the consumer. In a pure sales agency contract, the agent never takes title to the product being sold or marketed.

Because the principles governing sales agency contracts are so well-settled, such cases have not often reached the Federal Circuit Courts of Appeal. When they have reached that level, they have uniformly been upheld against attacks upon their certainty and definiteness. In *Jay Dreher Corporation v. Delco Appliance Corp.* (2nd CCA 1937) 93 F.2d 275, Judge L. Hand, writing for the majority, upheld the validity of a distribution contract though it contained no specification of the quantity to be sold.

In *Ken-Rad Corporation v. R.C. Bohannon,* (6th CCA 1935) 80 F.2d 251, the Court of Appeals upheld a sales agency contract which did not specify either the price of the product or the quantity to be sold. Citing a Second Circuit case, the Court held that:

> "There is no objection to a promise that it is indefinite so long as the parties can tell when it has been performed, and it is enough if, when the time arrives, there shall be in existence some standard by which that can be tested." (*Ken-Rad,* supra, at 253)

In *Bendix Home Appliances v. Radio Accessories Co.* (8th CCA) 129 F.2d 177, the Court of Appeals upheld the validity of a sales and distribution contract, despite the fact that the contract was made terminable at will. Discussing the contract, the Court said:

> "Contracts like the one under consideration are not pure sales contracts . . . They have some of the characteristics of agency and factorage contracts . . . the development of a market for the product and the exploitation of a sales territory by advertising and the solicitation of orders by salesmen are also involved. In such circumstances, the parties cannot be explicit as to quantity or amount. And since agreements of the kind under discussion are in common use among businessmen, they are to be given a practical interpretation . . . Courts are not inclined to hold them void for want of mutuality of obligation because the obligation of one party is imperfectly expressed . . . If from the whole contract it is manifest that the parties intended that for an express obligation on one of them, there should be a corresponding obligation upon the other, the correlative obligation will be implied though not expressed." (Citations omitted) (*Bendix,* supra, at 181)

Some of the contracts in the cases cited above did not specify their duration or were terminable at will. That situation is not present in the instant case. (Pet. App. page 9a-12a)

Circuit Courts of Appeal in the Second, Sixth, and Eighth Circuits have all enforced the special rules governing sales agency contracts, and have upheld their validity. In addition, Federal District Courts in the Third Circuit, and even the Ninth Circuit, have followed the national law on sales agency contracts, apparently without challenge on appeal. (See *Laveson v. Warner Mfg Co.* (1953 DC NJ) 117 F. Supp. 124, *Willred Co. v. Westmoreland Mfg Co.* (1959 ED Pa) 200 F.Supp 55, *J.C. Millet v. Park & Tilford Distillers,* (1954 DC Cal) 123 F.Supp 484)

It is believed that this is a case of first impression for this Court. However, in a case involving a pure sales contract, this Court held that a price term is not always essential to create a binding and valid contract. In *U.S. v. Swift,* (1926) 270 US 124, 46 S.Ct 308, 70 L.Ed 497, this Court held as valid a contract in which the price of the goods was left open to subsequent adjustment, on the grounds that, under the circumstance, it would have been difficult to set a price in the contract in advance of performance.

To Petitioners' knowledge, this Court has never before ruled upon a pure sales agency contract where that contract's certainty and definiteness have been challenged. Only Federal District Courts and the Circuit Courts of Appeal, along with state courts, have so far ruled on sales agency contracts. Their opinions have been unanimous in upholding the validity of sales agency contracts even where price and quantity have not been specified. In fact, Petitioners have not been able to find *any* contrary authority.

B. THERE IS AN OVERRIDING NEED FOR NATIONAL UNIFORMITY IN THE INTERPRETATION OF SALES AGENCY CONTRACTS

The decision of the Court of Appeals in this case marks the first time that the rules of interpretation of ordinary contracts have been applied to a sales agency contract. In addition to that, the Court of Appeals applied the rules of interpretation of *real estate* contracts which, in many instances, are even more restrictive than ordinary contract rules of interpretation. For important practical and economic reasons, sales agency contracts must continue to have their own rules of interpretation.

Many, if not most, of the sales agency contracts in the United States contain no provisions as to price and quantity. Such provisions are of less importance in such contracts because a pure sales agency contract is a contract for services, and not for the purchase or sale of goods.

Under the Ninth Circuit's decision, the validity and enforceability of thousands of sales agency contracts will be suspect. The decision will prevent the formation of many new sales agency agreements, and economic chaos in the distribution of products could easily result. If the Ninth Circuit's decision is left standing, a trend would develop against independent sales agents and distributors, who normally enter these types of contracts, and a tendency would be created toward large in-house distribution networks wholly owned by the manufacturers. The latter system is economically inefficient, and that has led to the largely independent distribution systems we have today.

Until the Ninth Circuits' decision, the national law of sales agency contracts was uniform. If that decision is left standing, it could result in a flood of new litigation over sales agency contracts, and would result in forum-shopping where, as here, the contract covers multi-state, and multi-Circuit areas.

CONCLUSION

This case presents important questions concerning the interpretation of contracts which extend far beyond state boundaries. The decision of the Ninth Circuit directly conflicts with national law on sales agency contracts, is inconsistent with federal common law, and may have a broad legal and economic impact in the United States.

Accordingly, this Court should grant Petitioners' request for a writ of certiorari to review the decision of the Court of Appeals in this case.

Respectfully submitted,

THOMAS M. MALEE
Attorney at Law
1045 North 24th Street
Billings, Montana 59101
(406) 245-8304

Counsel of Record for the Petitioners

APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 86-3731

D.C. No. CV-84-212-BLG

SIERRA MARKETING CO., a partnership of; RALPH BAWDEN; MOISE GALLEGOS,

Plaintiffs-Appellants,

v.

ROTATIONAL MOLDING, INC.,
a California corporation,

Defendant-Appellee.

Appeal from the District of Montana
James F. Battin, District Judge, Presiding
Argued and Submitted April 8, 1987
Seattle, Washington

MEMORANDUM*

FILED
AUG 5 1987
Before: BROWNING, Chief Judge, WRIGHT, and HALL, Circuit Judges.

Plaintiffs, Sierra Marketing Company (Sierra), Ralph Bawden (Bawden), and Morse Gallegos (Gallegos), brought an action against defendant, Rotational Molding, Inc. for breach of contract. A jury trial commenced March 31, 1986. On April 2, 1986, at the conclusion of the plaintiffs' case-in-chief, the defendant moved for a directed verdict. The court granted the motion, finding that the contract

was incomplete. Plaintiffs now appeal from the directed verdict.

Sierra is a Montana partnership composed of gallegos, a resident of Utah, and Bawden, a resident of Montana. Rotational Molding is a California corporation. Jurisdiction in the district court was based upon diversity of citizenship. 28 U.S.C. § 1332(a). We have jurisdiction over appeals from final decisions of district courts. 28 U.S.C. § 1291. We affirm.

I

Rotational Molding is engaged in the business of manufacturing rotationally molded plastic and polyethylene products. In 1982, Sierra partnership was formed for the purpose of marketing polyethylene septic tanks. In April 1983, Sierra entered into negotiations with Rotational Molding for the purposes of setting up a marketing and distribution system in the western United States for septic tanks to be produced by Rotational Molding. The agreement, dated May 25, 1983, included the following terms: (1) Sierra was appointed as the "exclusive Sales Agent for [Rotational Molding's septic tank products] in the States of Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming; (2) Rotational Molding was to pay Sierra 15% of the net invoice value on all septic tanks sold within the territory; (3) the contract term was to be five years, unless Sierra's volume of business fell short of the "quota schedule" in any size month period, in which case either party could cancel the agreement, and (4) Rotational Molding was to supply Sierra with a reasonable supply of samples and advertising material.

---

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

II

The parties agree that California substantive law applies. The parties are free to agree on which substantive law will govern their contract. *FDIC v. Bank of Am. Nat'l Trust and Sav. Ass'n.*, 701 F.2d 831, 834 (9th Cir.), *cert. denied*, 464 U.S. 935 (1983). Therefore, we will apply California law for the purposes of this appeal.

In general, we apply the federal standard of review in diversity cases, *Felder v. United States*, 543 F.2d 657, 664 (9th Cir. 1976), and we review a district court's directed verdict de novo. *West Am. Corp. v. Vaughan-Bassett Furniture Co., Inc.*, 765 F.2d 932, 934 (9th Cir. 1985). A court must review a directed verdict in a light most favorable to the appellant. *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1219 (9th Cir. 1983), *cert. denied*, 471 U.S. 1007 (1985). A directed verdict is warranted when the evidence supports just one reasonable conclusion. *Peterson v. Kennedy*, 771 F.2d 1244, 1256 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 1642 (1986).

III

The agreement signed in May 1983 referred to both a quota schedule and an annexed schedule of prices, neither of which was attached to the contract or agreed upon at the time the contract was signed. In *Ablett v. Clauson*, 43 Cal. 2d 280, 272 P.2d 753 (1954), the California Supreme Court stated that a contract is unenforceable if an essential term is left open for future agreement. *Id.* at 285, 272 P.2d at 756. Quoting from Williston on contracts, the court said:

> The general rule regarding contracts to agree in the future is stated to be as follows: "Although a promise may be sufficiently definite when it contains an option given to the promisor or promisee, yet if an essential element is reserved for

> the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise."

Id. at 284-85, 272 P.2d at 756.

Furthermore, if the parties are aware that their agreement is not complete because an essential term has not yet been agreed upon, no binding contract exists. *Louis Lesser Enter., Ltd. v. Roeder,* 209 Cal. App. 2d 401, 405, 25 Cal. Rptr. 917, 919 (1962). While most of the case law involves oral agreements, the same rule applies to written agreements. *Id.*

The evidence compels the conclusion that although the parties felt that the agreement was binding, they also considered it to be incomplete. Many elements were left open for future agreement. Rotational Molding had never before manufactured septic tanks. After signing the agreement, the parties arranged to meet again to agree on the proper design. The price of the tanks was left open, and, perhaps most importantly, no quota schedule was attached. Because the contract failed to set forth these essential terms, we find that the agreement is unenforceable and affirm the directed verdict.

The plaintiffs contend that, if the sales agreement is found to be incomplete, the parties subsequently reached a complete agreement on the open terms. A price term was agreed upon the week after the parties signed the contract. The price term, however, was the only open issue the parties managed to resolve.

Though the parties discussed quotas, only one actual quota schedule was ever proposed. In a March 1984 letter, Rotational Molding sent Sierra a list of suggested changes

to the original sales agreement, including a proposed quota schedule. Sierra immediately responded by attempting to accept the proposed quota schedule and reject the proposed alterations. Rotational Molding then countered by terminating the agreement altogether. Consequently, the parties never reached an agreement on a quota schedule. Furthermore, no final design acceptable to all parties was ever produced by Rotational Molding.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-3731
D.C. No. CV-84-212-BLG

SIERRA MARKETING CO., a partnership of;
RALPH BAWDEN; MOISE GALLEGOS,
Plaintiffs-Appellants,

v.

ROTATIONAL MOLDING, INC.,
a California corporation,
Defendant-Appellee.

ORDER

FILED
SEP 24 1987
Before: BROWNING, Chief Judge, WRIGHT, and HALL, Circuit Judges.

The panel has voted to deny the petition for rehearing. Chief Judge Browning and Judge Hall reject the suggestion for rehearing en banc and Judge Wright so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

U S DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLING DIVISION

CV-84-212-BLG

OPINION

The Court: all right, the Court is prepared to rule. It is unfortunate with the expenses that have been involved this far with the result that I find is the only result that the Court can arrive at. The contract, which is Exhibit 2, is a sales agreement. It is signed by the parties. I don't think there is any question about that, or anybody is contending otherwise. The big problem is with the sales agreement. It is quite incomplete. The first recitation in the whereas clause is that plaintiff is engaged in the business of manufacturing and selling septic tanks. At the time that this was signed, as far as I understood the testimony, the defendant was not engaged in manufacturing and selling polyethylene septic tanks, and the plaintiffs were well aware of that, because we went through who would be responsible for the design of the septic tanks, and the pricing of them and the rest of it.

I have read over this contract any number of times prior to trial as well as here listening to the evidence. There is no requirement in the agreement that the principal being the defendant, has to manufacture any septic tanks. There is no requirement in the original agreement that was signed as to any quota that the plaintiffs would have to meet in order to stay within the provisions of the quota contemplated by the agreement. There is a sales area outlined, namely the western states, and they would certainly be

covered had the agreement been in itself complete. But it is not complete.

I'm just guessing what happened from the testimony of Mr. Bawden and Mr. Gallegos, that they had a bad experience with the Norwesco group in Minnesota relative to an oral agreement, and they didn't want to get burned by that again, so they wanted something in writing to protect themselves. Well, Mr. Bawden testified that he was the drafter or the author of the agreement, and the agreement doesn't go far enough to place any responsibility on either of the parties.

The agreement is placed before the Court. Nowhere in the agreement is the principal required to manufacture for sale any number of septic tanks in any given time period until I believe we were here, at least the testimony is Exhibit 13, which would be the quota established for 1984 and '85. The plaintiff is willing to accept that as being a part of what was contemplated in the original contract, but that doesn't do us any good, because there weren't at the time any septic tanks produced for sale. Certainly the conversations between the plaintiff and defendant relative to Mr. Sweet, who might purchase somewhere between one and 4,000 septic tanks is a carrot, but, again, it is not binding on anybody. Nobody could force Mr. Sweet at any point to live up to his thought, if the price is right and if it is built to my specifications.

It is unfortunate, but I don't believe there is an enforceable agreement under the exhibit that has been introduced and that has been placed before the Court and the jury As a result, the Court will grant the motion for a directed verdict, and the clerk is directed to enter a verdict in favor of the defendant and against the plaintiffs.

Would you call the jury back, please.

APPENDIX D

BASIC SALES AGENCY AGREEMENT

THIS AGREEMENT made this 25th day of May, 1983 by and between Rotational Molding Incorporated a corporation duly organized and existing under the laws of the State of California, and having its principal place of business at No. 17038 South Figueroa Street, City of Gardena, State of California, hereinafter called the Principal and Sierra Marketing Company a Limited Partnership and having its principal place or business at No. 2015 Ave. B, City of Billings, State of Montana, hereinafter called the Sales Agent.

WITNESSETH

WHEREAS, the Principal is engaged in the business of manufacturing and selling Septic Tanks; and

Whereas, the Principal desires to appoint the Sales Agent and the Sales Agent desires to become the sales representative of the Principal's aforesaid products.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, the parties do hereby agree as follows:

EXCLUSIVE AGENCY

(1) The Principal hereby appoints Sierra Marketing Company as exclusive Sales Agent in the States of Alaska, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming to sell the Septic tank products manufactured by the Principal.

COMPENSATION TO BE PAID

(2) The Principal shall pay the Sales Agent as compensation for their services a commission of Fifteen (15%) percent of the net invoice value of all shipments of its Septic Tanks products to any of their territory for which

payment shall have been received by the Principal. The commissions shall be paid on twentieth day of each month for all shipments paid for during the preceding calendar month. After 120 days no commission.

DURATION OF AGREEMENT--QUOTA BASIS

(3 a) This agreement shall continue in full force and effect for Five (5) years from the date of its execution, unless the Agent's volume of business falls short of the agreed amount at the end of any half-yearly period, as reflected by Exhibit "A" attached hereto and made a part hereof, labeled QUOTA SCHEDULE, whereupon either party shall have the option of cancelling this agreement upon Six (6) months advance written notice with all obligations satisfied.

(3 b) If this agreement is not cancelled by notice by either party, or for any other reason before the expiration of the agreed period herein, and provided no provision is made in Exhibit "A" for interim review and fixing of quota schedules beyond the period of the initial agreement, it shall automatically renew itself from year to year, on the quota basis provided for in the last year of the appended Quota Schedule.

SOLICITING SALES; QUOTING PRICES; FORWARDING ORDERS

(4) The Sales Agent shall not solicit or accept any orders outside the states assigned it by the Principal without prior sanction by the Principal. In obtaining sales of the Principal's products, the Sales Agent shall quote only the prices and terms set forth in the annexed schedule or such prices and terms as may be fixed hereafter by the Principal. The Sales Agent shall forward all orders promptly to the Principal and each order shall be subject to the Principal's acceptance. The Principal shall forward to the agent two copies of invoices covering shipments of its products to any part of their territory.

AGENT MAY EMPLOY SALESMEN

(5) The Sales Agent shall have full authority to employ such salesmen at such compensation and on such other conditions as he deems proper to sell in the territory herein set forth the goods of the Principal. The contract to be made by the Sales Agent with such salesmen are the employees of the Sales Agent and are to be paid by him alone, and that in employing such salesmen, he is acting individually and not as agent or attorney for the Principal.

FURNISHING OF SAMPLES AND ADVERTISING MATTER

(6) The Principal shall furnish its agent at its own expense, a reasonable supply of samples and advertising matter to be used by him in connection with his agency hereunder, Sample cases are the exclusive property of the Principal and the Sales Agent shall return them to the Principal at the Principals expense, upon termination of this agreement

PAYMENT OF EXPENSES

(7) The Sales Agent shall assume and pay all the costs of conducting the sales agency hereunder. This shall include the aforementioned commissions or other compensation to salesmen in his employ.

ASSIGNMENT

(8) This Agreement shall not be assigned by the Sales Agent without the Principal's prior written consent.

TERMINATION OF AGREEMENT

(9) If the Sales Agent violates any provision of this agreement or becomes insolvent or bankrupt, the Principal may on sixty (60) days written notice to the Sales Agent terminate this agreement, but the Principal shall be obligated to pay the Sales Agent the commissions earned by him up to he date of termination.

IN WITNESS WHEREOF, the parties have signed this agreement.

Rotational Molding Inc.	Siera Marketing Company
By /s/SHERMAN MCKINNIS President	By /s/RALPH BAWDEN Ralph D. Bawden - Partner
Attest:	
By_____ Secretary	By /s/MOISE GALLEGOS Moise Gallegos - Partner
Corporate Seal	

APPENDIX E

Rotational Molding Inc.
17038 SOUTH FIGURE STREET
GARDENA, CALIFORNIA 90248
327-5401 (AREA CODE 213) 770-0942

June 9, 1983

Mr. Moise Gallegos
Sierra marketing Enterprises
P.O. Box 26733
Salt lake city, Utah 84126

Dear Moise,

Pursuant to our conversation regarding commission structure for items manufactured by RMI, are as follows:

1. Quoted price for septic tanks FOB, Gardena at $350 per unit includes your 15% commission.

2. You can purchase our proprietary tank line at 25% discount from our list price, FOB, Caldwell, Idaho. The same terms will apply FOB, Gardena, CA in the event your shipping destination is more favorable to California freight rates.

3. All other custom applications (i.e. fish hatch tank) will be quoted net price FOB, Gardena, CA.

Moise, should you have any additional questions regarding pricing, please feel free to contact me.

I have also enclosed a recent article in reference to plumbing codes used in the United States, for your information. Your comments would be appreciated.

Very truly yours,

ROTATIONAL
MOLDING

Raleight E. Willson
Director of Marketing

enclosures

cc: S. Mckinniss
L. Derickson
S. Brown
B. Hill

APPENDIX F

ROTATIONAL MOLDING INC.

17038 SOUTH FIGUEROA STREET
GARDENA, CALIFORNIA 90248
327-5401 (AREA CODE 213) 770-0942

March 23, 1984

Ralph D. Bawden
Sierra Marketing Company
2015 Avenue B
Billings, Montana 59102

Dear Ralph,

As I had previously stated the commission would be a flat $50.00 per tank sold, delivered and for which we had received payment. That position is nonnegotiable as I explained in my previous letter and your acceptance determines the continuation of our agreement.

With that in mind I have modified the sales agreement per the points which I outlined in our discussions in Billings. We have a large capital investment at this juncture and can ill afford to delay further.

I view this opportunity as the right time to demonstrate the successful implementation of a new product into the market place that is mutually rewarding and an illustration of trust and good faith in our dealings.

Ralph, please call if you have any questions about the addendum or sales projections. Sign and return the original as soon as you and Mois have had a chance to review them.

Very truly yours,

Raleight E. Wilson

Director of marketing

Attachment
cc: S. McKinniss
L. Deric kson

REW/arp

Plaintiffs
Exhibit 11

APPENDIX G

ADDENDUM TO

BASIC SALES AGENCY AGREEMENT

This addendum made this 1st day of April 1984 to the AGREEMENT dated the 25th day of May 1984 by and between Rotational Molding, Incorporated a corporation duly organized and existing under the laws of the State of California, and having it's principal place of business at 17038 south Figueroa Street, City of Gardena, State of California, hereinafter called the Principal and Sierra marketing Company a Limited Partnership and having it's principal place of business at 2015 Ave B, City of Billings, Montana, hereinafter called the Sales Agent.

WITNESSETH

WHEREAS, the principal is engaged in the business of manufacturing and selling Septic Tanks; and

WHEREAS, the Principal desires to appoint the Sales Agent and the Sales Agent desires to become the Sales Representative of the principals aforesaid products.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, the parties do hereby agree as follows:

EXCLUSIVE AGENCY

(1a) The Principal hereby appoints Sierra marketing Company as exclusive Sales Agent in the States of Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Wyoming and Utah subject to each state law on exclusivity.

(1b) The Principal appoints Sierra Marketing Company as Sales Agent in the State of California. Non exclusive territories will include areas within a 50 mile radius of the City's of Fresno, Bakersfield, Paso Robles and Oakland.

(1c) The Sales Agent further agrees to not conducting business in the States of Washington and Oregon which will remain the sole providence of the Principal.

COMPENSATION TO BE PAID

(2) The Principal shall pay the Sales Agent as compensation for their services a fee of ($50) fifth dollars per Septic Tank sold, delivered and for which payment has been received by the Principal. The compensations shall be paid on twentieth day of each month for all shipments paid for during the preceding calendar month.

(2b) The Principal shall determine all pricing on day of shipment.

DURATION OF AGREEMENT-QUOTA BASIS

(3a) This agreement shall continue in full force and effect for one (1) year from the date of its execution, unless the Agents volume of business falls short of the agreed amount at the end of any 90 day period, as reflected by exhibit "A" attached hereto and made a part hereof, labeled, QUOTA SCHEDULE, whereupon this agreement will be cancelled without written notice and all compensations owed to the Sales Agent will be paid within (30) thirty days of the termination of aforementioned agreement for which payment has been received by the Principal.

SOLICITING SALES; QUOTING PRICES; FORWARDING ORDERS

AGENT MAY EMPLOY SALESMEN

(5) The Sales Agent shall have full authority to employ such salesmen at such compensation and on such other conditions as he deems proper to sell in the territory herein set forth the goods of the Principal. The contract to be made by the Sales Agent with such salesmen are the employees of the Sales Agent and are to be paid by him alone, and hat in employing such salesmen, he is acting individually and not as agent or attorney for the Principal.

FURNISHING OF SAMPLES AND ADVERTISING MATTER

(6) The Principal shall furnish its agent at its own expense, a reasonable supply of samples and advertising matter to be used by him in connection with his agency hereunder, sample cases re the exclusive property of the principal and the Sales Agent shall return them to the principal at the Principals expense, upon termination of this agreement.

PAYMENT OF EXPENSES

(7) The Sales Agent shall assume and pay all the costs of conducting the sales agency hereunder. This shall include the aforementioned commissions or other compensation to salesmen in his employ.

ASSIGNMENT

(8) This Agreement shall not be assigned by the Sales Agent without the Principal's prior written consent.

IN WITNESS WHEREOF, the parties have signed this agreement.

Rotational Molding Inc.	Siera Marketing Company
By_____	By_____
President	Ralph D. Bawden - Partner
Attest:	
By /s/RALEIGH WILLSON	By_____
Directing of Marketing	Moise Gallegos - Partner
Corporate Seal	

Plaintiffs
Exhibit 12 (p.2)

APPENDIX H

SIERRA MARKETING ENTERPRISES

MANUFACTURERS REPRESENTATIVE

Sierra Marketing Co.
2015 Ave B
Billings, Montana 59102
(406) 259-6377

Sierra Marketing Co.
P.O. Box 26733
2115 West 2200 So.
Salt Lake City, UT 84126
(801) 534-7884

April 3, 1984

Raleigh E. Willson
Rotational Molding Inc.
17038 South Figueroa Street
Gardena, CA 90248

Dear Raleigh:

I have received your letter of March 23, 1984. We agree with the Quota Schedule you sent and we can make it a part of our original contract of May 25, 1983. I also previously offered to lower the commission rate to 12%, and we will stand by that offer. However, I will not agree to any of the other changes you want to make to our contract. Mr. McKinniss signed our contract in May of 1983, and now you seem intent on breaching that agreement.

We are ready and willing to perform our end of the contract and except for lowering the commission to 12%, we must insist that you abide by all of the other terms of our original contract.

Please advise us as to when you expect to have the tanks approved, when you will be able to provide us with sales literature and materials, and when you will have the tanks available for sale.

Thank you.

Very truly yours,

/s/RALPH BAWDEN
Ralph Bawden